Filed 12/12/16 In re T.R. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re T.R. et al., Persons Coming Under the Juvenile Court Law.	
MENDOCINO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. MATTHEW K., et al., Defendants and Appellants.	A148175 (Mendocino County Super. Ct. Nos. SCUK-JVSQ-14-17082, SCUK-JVSQ-14-17083)

Mother and father appeal an order terminating their parental rights to their now five-year-old son and seven-year-old daughter. They contend, based on the two children constituting a "sibling group" for whom no prospective adoptive parents have been identified and the children's individual behavioral challenges, there is no substantial evidence to support the court's finding under Welfare and Institutions Code[1] section 366.26, subdivision (c)(1), that the children are likely to be adopted. We find no error and shall affirm the order.

Background

It is undisputed that both mother and father have extensive mental health problems that have rendered them unable to care for their children. Mother has been diagnosed with schizophrenia and has been prescribed a variety of psychiatric medications. She has

[1] All statutory references are to the Welfare and Institutions Code.

been hospitalized at least twice and was essentially catatonic at the commencement of these proceedings. Father also has been diagnosed with schizophrenia and has been hospitalized numerous times. At the start of the proceedings it was reported that father had not had contact with the children for at least four years. He was represented in the proceeding through appointment of a guardian at litem.

On October 24, 2014, the children were detained and removed from the custody of their mother after she was placed on an involuntary mental health hold due to a grave disability (Welf. & Inst. Code § 5150). At the jurisdictional hearing, the court found that the children came within the jurisdiction of the juvenile court under section 300, subdivision (b) in that both parents have serious mental health problems that interfere with their ability to provide safe and adequate care for their children.

At the dispositional hearing, the court found that the parents' severe mental disabilities rendered them incapable of adequately caring for the children within the time limits specified in section 361.5, subdivision (a), even with the provision of reunification services.[2] Reunification services were not ordered and a section 366.26 hearing was set for September 24, 2015.

The social worker's report and the adoption assessment prepared for the section 366.26 hearing evaluated the children's physical and emotional condition and development progress. Both reports opined that the children were likely to be adopted. The social worker's report, however, noted that there was no identified prospective adoptive parents and thus recommended that the hearing be continued for 180 days.

[2] Section 361.5, subdivision (b)(2) authorizes the court to deny reunifications upon a finding that the parents is "suffering from a mental disability that is described in Chapter 2 (commencing with Section 7820) of Part 4 of Division 12 of the Family Code and that renders him or her incapable of utilizing those services." Section 361.5, subdivision (c) provides further, "When it is alleged, pursuant to paragraph (2) of subdivision (b), that the parent is incapable of utilizing services due to mental disability, the court shall order reunification services unless competent evidence from mental health professionals establishes that, even with the provision of services, the parent is unlikely to be capable of adequately caring for the child within the time limits specified in subdivision (a)."

At the September 2015 hearing, the children's counsel requested, and the department concurred in the request, that an order be entered that "the children not be separated or put in different homes without a court order." The adoption worker assured counsel and the court that she would "never separate these children" because "they're very bonded." At the conclusion of the hearing, the court granted the 180-day continuance and ordered further that the children not be placed in separate homes for purposes of adoption without prior court order "so that all parties can be heard before such a decision would be made."

The continued section 366.26 hearing was held on March 22, 2016. An updated social worker's report and an updated adoption assessment were filed and admitted into evidence. The reports recommended a permanent plan of adoption and that parental rights be terminated. The state adoption worker testified that since the filing of the updated report, a potential adoptive family had been identified that were "very much hopeful of having children move into their home." The adoption worker "just recently had a disclosure meeting with that family" and she explained that if parental rights are terminated she would begin preparing a transition plan. She acknowledged, however, that she did not know how long it would take because she needed "to be careful with two small children who have been with their loving foster parents for a year." Minors' counsel reported that the siblings are "very close" and sought confirmation from the adoption worker that the intention was to keep them together. The adoption worker stated in response, "I would never, ever separate these two siblings. They're attached. They have never been separated, and I would never separate them." At the conclusion of the hearing, the court found that the children were likely to be adopted, terminated parental rights, and selected adoption as the permanent plan. Parents timely filed a notice of appeal.

Discussion

Parents contend that the court erred in terminating their parental rights when the 180-day continuance expired without identification of an approved adoptive family for the children. They argue there is no substantial evidence that the children are adoptable

and that the court should have found that long-term foster care was in the children's best interest. We disagree.

A section 366.26 hearing is "specifically designed to select and implement a permanent plan for the child." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 304.) The procedures set forth in section 366.26 "are the exclusive procedures for conducting these hearings." (§ 366.26, subd. (a).)

Under section 366.26, subdivision (b), the court must "make findings and orders in the following order of preference: [¶] (1) Terminate the rights of the parent or parents and order that the child be placed for adoption . . . . [¶] (2) Order, without termination of parental rights, the plan of tribal customary adoption . . . . [¶] (3) Appoint a relative or relatives with whom the child is currently residing as legal guardian or guardians for the child . . . . [¶] (4) On making a finding under paragraph (3) of subdivision (c), identify adoption or tribal customary adoption as the permanent placement goal and order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days. [¶] (5) Appoint a nonrelative legal guardian for the child . . . . [¶] (6) Order that the child be permanently placed with a fit and willing relative . . . . [¶] (7) Order that the child remain in foster care . . . ."

In choosing among these alternatives, the court must first determine by clear and convincing evidence whether a child is likely to be adopted. A child is generally considered adoptable when his or her personal characteristics are sufficiently appealing to make it likely that an adoptive family will be located in a reasonable time, regardless of whether a prospective adoptive family has been found. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) "[T]he statutory scheme and case law require a determination of the adoptability of a child as an individual: ' "The issue of adoptability . . . focuses on the minor, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor." ' " (*In re I.I.* (2008) 168 Cal.App.4th 857, 872)

Generally, if a child is found to be adoptable, the court must terminate parental rights unless it finds a compelling reason for determining that termination would be

detrimental to the child. (§ 366.26, subd. (c)(1).) If the court finds that termination of parental rights would not be detrimental to the child and that the child has a "probability for adoption" but that the child is "difficult to place for adoption" because "there is no identified or available prospective adoptive parent for the child because of the child's membership in a sibling group," the court "may identify adoption as the permanent placement goal and without terminating parental rights, order that efforts be made to locate an appropriate adoptive family for the child, within the state or out of the state, within a period not to exceed 180 days." (§ 366.26, subd. (c)(3).) [3]

The 180-day period is not merely a continuance of the section 366.26 hearing. (*In re Gabriel G.* (2005) 134 Cal.App.4th 1428, 1436; see also *In re S.B.* (2009) 46 Cal.4th 529, 536.) Upon expiration of the 180 day period the court's discretion to select a permanent plan under section 366.26, subdivision (b) is severely restricted. (§ 366.26,

[3] Section 366.26, subdivision (c)(3) reads in full: "If the court finds that termination of parental rights would not be detrimental to the child pursuant to paragraph (1) and that the child has a probability for adoption but is difficult to place for adoption and there is no identified or available prospective adoptive parent, the court may identify adoption as the permanent placement goal and without terminating parental rights, order that efforts be made to locate an appropriate adoptive family for the child, within the state or out of the state, within a period not to exceed 180 days. During this 180-day period, the public agency responsible for seeking adoptive parents for each child shall, to the extent possible, ask each child who is 10 years of age or older, to identify any individuals, other than the child's siblings, who are important to the child, in order to identify potential adoptive parents. The public agency may ask any other child to provide that information, as appropriate. During the 180-day period, the public agency shall, to the extent possible, contact other private and public adoption agencies regarding the availability of the child for adoption. During the 180-day period, the public agency shall conduct the search for adoptive parents in the same manner as prescribed for children in Sections 8708 and 8709 of the Family Code. At the expiration of this period, another hearing shall be held and the court shall proceed pursuant to paragraph (1), (2), (3), (5), or (6) of subdivision (b). For purposes of this section, a child may only be found to be difficult to place for adoption if there is no identified or available prospective adoptive parent for the child because of the child's membership in a sibling group, or the presence of a diagnosed medical, physical, or mental handicap, or the child is seven years of age or more." A "sibling group" is defined as "two or more children who are related to each other as full or half siblings." (§ 361.5, subd. (a)(1)(C).)

subd. (c)(3) ["At the expiration of this period, another hearing shall be held and the court shall proceed pursuant to paragraph (1), (2), (3), (5), or (6) of subdivision (b)."].) In *In re Gabriel G.*, *supra*, 134 Cal.App.4th at page 1436 the court explained that prior to 2003, following expiration of the 180-day period, subdivision (c)(3) authorized the juvenile court to select adoption, legal guardianship, or long-term foster care as the permanent plan for a dependent child. This "arguably, made the further hearing like a continuance of the section 366.26 hearing. Now, however, the Legislature has eliminated the option of long-term foster care when no adoptive placement is found." (*Gabriel G.*, p. 1436.) In *In re S.B.*, *supra*, 46 Cal.4th at pages 535-536, the court approved of *Gabriel G.*, noting that "[t]he omission of any reference to . . . long-term foster care, reflects a legislative conclusion that long-term foster care is inappropriate once adoption is found to be probable under section 366.26(c)(3)."

In this case, three statutory options were applicable at the September 2015 hearing: (1) termination of parental rights and freeing the children for adoption, (2) identifying adoption as the permanent placement goal and ordering that efforts be made to locate an appropriate adoptive family within a period not to exceed 180 days, or (3) ordering that the children be placed in long-term foster care. The court found that the children were likely to be adopted, but because it was in their best interest to be adopted together and no adoptive family had been identified for the sibling group, the court identified adoption as the permanent placement goal and ordered that efforts be made to locate an appropriate adoptive family within a period not to exceed 180 days.[4]

[4] We note that parents have not argued at any point in the proceedings that the sibling benefit exception under section 366.26, subdivision (c)(1)(B)(v) applied in this instance. This exception authorizes a finding that termination of parental rights would be detrimental to the child if "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence

At the March 2016 section 366.26 hearing, the court again found that the children were likely to be adopted and accordingly, terminated parental rights. The adoptability findings are supported by substantial evidence. (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732 ["On appeal, we review the factual basis for the trial court's finding of adoptability . . . for substantial evidence."].) The social worker's report and the adoption assessment indicated that the children were both in good physical health and neither child had any developmental disabilities that would impair adoption. While the September reports noted some concerning behaviors of the children, by the time of the March hearing the social worker reported that the concerning behaviors had lessened and that the children had been evaluated by a therapist and two other service providers and neither therapy nor developmental services were assessed to be appropriate. On this evidence the court reasonably concluded that the children were generally adoptable.

The facts that it was uniformly agreed that keeping the children together was in the children's best interest and a permanent adoptive home for the two siblings had not been approved does not weigh against the termination of parental rights. If in time it becomes clear that a suitable joint placement cannot be found, the children are not without recourse. Under section 366.26, subdivision (i)(3), "A child who has not been adopted after the passage of at least three years from the date the court terminated parental rights and for whom the court has determined that adoption is no longer the permanent plan may petition the juvenile court to reinstate parental rights pursuant to the procedure prescribed by Section 388. The child may file the petition prior to the expiration of this three-year period if the state Department of Social Services, county adoption agency, or licensed adoption agency that is responsible for custody and supervision of the child as described in subdivision (j) and the child stipulate that the child is no longer likely to be adopted." (See also *In re S.B.*, *supra*, 46 Cal.4th at pp. 536-537 ["If adoption proves to be impossible, that change of circumstances would justify a modification of the findings and

---

through adoption." The decision not to assert the exception is likely premised on the assurances by the adoption worker that the children would not be separated.

order made by the court under section 366.26(b). (§ 388.) In a modification proceeding, all the relevant circumstances will be before the court and long-term foster care can be instituted with the appropriate provisions for periodic review, ensuring that the child is not in danger of falling through the cracks."].) Selection of long term foster care as the permanent plan at the continued section 366.26 hearing, as parents proposed, would have been contrary to the clear legislative intent and unnecessarily limited the children's chances for adoption.

Finally, we reject father's contention that the court erred in terminating parental rights without first obtaining information about the children's feelings regarding termination of the parents' rights. "Section 366.26, subdivision (h) requires the court at the selection and implementation hearing to 'consider the wishes of the child.' This evidence may be presented by direct formal testimony in court, informal direct communication with the court in chambers, reports prepared for the hearing, letters, telephone calls to the court, or electronic recordings. [Citation.] However, the court must only consider the child's wishes to the extent those wishes are ascertainable. [Citation] A child may not be able to understand the concept of adoption." (*In re Joshua G*. (2005) 129 Cal.App.4th 189, 200-201.) Here, at the time of the hearing, the children were five and six years old. The adoption assessment states that the children were not interviewed about "their attitude toward placement and adoption due to their young age." Given their ages, the social workers reasonably determined that the children were too young to understand, much less express, their wishes regarding the proceedings. (*In re Juan H*. (1992) 11 Cal.App.4th 169, 173.) We note also that father did not challenge the statement in the report at the hearing.

In conclusion, we find no error in the order terminating parental rights and, thus, shall affirm the order.

Disposition

The order terminating parental rights is affirmed.

_____
Pollak, J.

We concur:

_____
McGuiness, P.J.

_____
Jenkins, J.